Filed 7/21/09 Gergov v. Valverde CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| NICK V. GERGOV,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>GEORGE VALVERDE, as Director, etc., et al.,<br><br>Defendant and Respondent. | B209408<br><br>(Los Angeles County Super. Ct. No. BS110460) |

APPEAL from an order of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Lisitsa Law Corporation and Yevgeniya Lisitsa for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Elizabeth Hong, Deputy Attorney General, for Defendant and Respondent.

* * * * * *

Plaintiff and appellant Nick V. Gergov appeals from the trial court's order denying him an award of fees and costs issued in connection with a judgment denying his petition for writ of mandate filed against defendant and respondent the Director of the California Department of Motor Vehicles (DMV). We affirm. The trial court properly exercised its discretion in concluding that appellant was not a prevailing party entitled to an award of costs. Nor was appellant entitled to an award of attorney fees under Government Code section 800 or as a "catalyst" motivating the DMV to correct the duration of his driver's license suspension.

## FACTUAL AND PROCEDURAL BACKGROUND

When Glendale Police Department officers initiated a traffic stop of appellant in May 2006, they formed the opinion that appellant was driving under the influence of alcohol based on the odor of alcohol in appellant's car, appellant's poor performance on field sobriety tests and appellant's admission that he had recently consumed four 12-ounce cans of beer. Appellant was arrested and charged with violating Vehicle Code section 23152, subdivision (a). Appellant refused to submit to any chemical test to determine his blood alcohol level, even though officers informed him that his license would be suspended by reason of the refusal.

Effective June 20, 2006, the DMV issued to appellant an administrative per se suspension/revocation order and temporary driver license. Appellant appealed the order, and the DMV conducted an informal administrative hearing on June 24, 2006 and a review on June 28, 2006. A DMV hearing officer issued an administrative per se-refusal, notification of findings and decision, which affirmed the initial one-year suspension of appellant's driver's license, effective July 7, 2006. Appellant sought administrative review of the hearing officer's decision, but the DMV was unable to conduct further review because it lost the administrative record.

In September 2006, appellant filed a petition for writ of mandate in the Superior Court of Los Angeles County challenging his license suspension, *Gergov v. Department of Motor Vehicles,* case No. BS105355 (*Gergov I*). In December 2006, the trial court

granted the petition in *Gergov I* and directed the DMV to vacate its prior administrative decision and to conduct a new hearing. The basis for the court's ruling was the DMV's failure to disclose to appellant that it had lost the administrative record. The court reasoned that the DMV had a duty to appellant to inform him of the loss and to conduct a new administrative hearing, and the failure to fulfill those duties was arbitrary and capricious. The court ordered the DMV to pay appellant's fees and costs pursuant to Government Code section 800, subdivision (a), as judicial review was necessitated by the DMV's arbitrary and capricious actions. As a result of this order, effective February 2, 2007, the DMV stayed appellant's suspension.

On March 12, 2007, the DMV conducted a new administrative hearing and the hearing officer affirmed the prior suspension. Appellant received notification that his one-year license suspension would be reimposed, effective between June 2, 2007 and June 1, 2008. Following appellant's request for administrative review of the decision, the DMV affirmed the hearing officer's determination.

Appellant filed a second petition for writ of mandate in August 2007 (*Gergov II*). He sought an order reversing the DMV findings in their entirety and, at a minimum, reversing the second suspension order because it effectively extended the term of his one-year suspension. On September 26, 2007, the DMV issued a corrected order of suspension, which stated in pertinent part: "This is in response to your inquiry regarding the amount of suspension time assessed against your driving privilege. After an internal review of the information on file, the decision is to correct your driving record to reflect credit for that portion of the suspension already served. [¶] The one-year suspension of your driving privilege taken pursuant to Vehicle Code Section 13353 effective June 2, 2007, through June 1, 2008, has been corrected. As a result, your driving record will reflect that the one-year suspension of your driving privilege is effective June 2, 2007, through November 3, 2007."

Thereafter, the DMV issued a general denial in response to the petition for writ of mandate in *Gergov II* and opposed the petition on several bases, including that any challenge to the duration of appellant's suspension was moot.

Following a May 9, 2008 hearing, the trial court issued a tentative ruling denying the *Gergov II* petition for writ of mandate in its entirety. With respect to appellant's contention that the DMV improperly suspended his license for more than one year, the court stated: "The DMV suspended Gergov's license on July 7, 2006 through February 2, 2007. [Citation.] At that time, the DMV imposed a stay on the suspension following Gergov I. The suspension was reimposed, initially from June 2, 2007 through June 1, 2008, but later corrected to from September 26, 2007 through November 3, 2007. The total suspension is one year." Prior to entry of judgment, appellant filed a memorandum of costs seeking an award of costs and attorney fees in the amount of $11,042.50. On May 29, 2008, the trial court entered judgment denying the petition for writ of mandate, determining "that the administrative findings are supported by the weight of the evidence and that the issue of the length of the suspension had become moot." Interlineating the judgment's proposed award of costs to the DMV, the court ordered "Each side to bear its own costs."

Appellant filed a notice of appeal from the judgment and the order denying him an award of costs and attorney fees.

## DISCUSSION

Though appellant appealed from the judgment and the order denying him costs and attorney fees, his arguments on appeal are directed only to the latter. He contends the trial court erred in requiring each party to bear its own costs; he asserts that he was a prevailing party entitled to an award of costs, Government Code section 800 authorized an award of costs and attorney fees, and he was a "catalyst" motivating the DMV's action in his favor. Each of these three contentions lacks merit.

### I. Appellant Was Not a Prevailing Party.

"Where, as here, the determination of whether costs should be awarded is an issue of law on undisputed facts, we exercise de novo review. [Citation.]" (*City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, 678.)

"'[T]he right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party.' [Citations.]" (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439.) Code of Civil Procedure section 1032, subdivision (b), is an authorizing statute, providing that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Defining the term "prevailing party," Code of Civil Procedure section 1032, subdivision (a)(4) states: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (See also Code Civ. Proc., § 1033.5, subd. (a)(10) [allowing attorney fees as costs under section 1032].)

In *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 975–977 (*Wakefield*), the court explained that prevailing parties are classified into two distinct groups. The first group is comprised of four categories of litigants who qualify automatically as prevailing parties. The trial court lacks discretion "to deny prevailing party status to a litigant who falls within one of the four statutory categories in the first prong of the provision. 'As rewritten [in 1986], [Code of Civil Procedure] section 1032 now declares that costs are available as "a matter of right" when the prevailing party is within one of the four categories designated by statute. ([Code Civ. Proc., § 1032, subds. (a)(4), (b).)' [Citations.]" (*Wakefield, supra*, at pp. 975–976; accord, *Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1197–1198.) When a party falls into the second group of litigants—parties who recover other than monetary relief and those in situations other than as specified in the first prong of the statute—the trial court may exercise its discretion to determine who is the prevailing party and award costs accordingly. (*Wakefield, supra*, at

p. 977.) "The operation of this second prong has been described as follows: 'Where the prevailing party is one not specified, [] [Code of Civil Procedure] section 1032, subdivision (a)(4) permits the trial court to determine the prevailing party and then allow costs or not, or to apportion costs, in its discretion. The statute requires the trial court to determine which party is prevailing and then exercise its discretion in awarding costs.' [Citations.] . . . . [¶] This prong of the statute thus calls for the trial court to exercise its discretion both in determining the prevailing party and in allowing, denying, or apportioning costs. It operates as an express statutory exception to the general rule that a prevailing party is entitled to costs as a matter of right. [Citation.]" (*Ibid*.)

Here, the trial court properly applied the second prong of the statute, exercising its discretion to determine that the circumstances warranted the conclusion that appellant was not a prevailing party entitled to costs. Indeed, the judgment provided no support for appellant's contention that he was a prevailing party, as the trial court denied the petition for writ of mandate in its entirety, ordered that judgment be entered in favor of the DMV and ordered that appellant take nothing under the action. Arguably, the DMV was the prevailing party, particularly given the trial court's determination that the issue regarding the duration of appellant's suspension was moot. (See *City of Long Beach v. Stevedoring Services of America, supra,* 157 Cal.App.4th at p. 680 [when a cross-complaint is dismissed as moot, the cross-defendant is a prevailing party entitled to costs as a matter of right].) At best, the DMV's earlier correction could be construed as circumstances providing the trial court with some level of discretion to award appellant his costs. (Code Civ. Proc., § 1032, subd. (a)(4).) Though appellant contends the trial court abused its discretion given that it was the DMV's earlier error which prompted his litigation, he ignores the fact that he continued to pursue his petition for writ of mandate seeking to overturn the entire suspension, notwithstanding the DMV's suspension correction. Under these circumstances, we find no error in the trial court's exercise of discretion to order each party to bear its own costs. (See also *Ellis v. City Council* (1963) 222 Cal.App.2d 490, 500–501 [Code Civ. Proc., § 1095 affords the court discretion to award costs to a successful petitioner for writ of mandate].)

## II. Appellant Was Not Entitled to Attorney Fees Under Government Code Section 800.

Government Code section 800 "permits a litigant who successfully challenges the determination of an administrative agency to recover attorney fees if the litigant demonstrates that the agency acted in an arbitrary or capricious manner. [Citation.] The statute sets out four conditions for the recovery of attorney fees: (1) a civil action to review a determination of an administrative proceeding; (2) the complainant prevailed against a public entity or official; (3) arbitrary or capricious action or conduct by a public entity or official; and (4) the complainant is personally obligated to pay the fees. [Citation.]" (*Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 Cal.App.4th 249, 255, fn. omitted.) We review the trial court's denial of attorney fees under this statute for an abuse of discretion. (*Mitchell v. State Personnel Bd.* (1979) 90 Cal.App.3d 808, 814.) Given that appellant failed to establish the requisite conditions of the statute, we find no basis to disturb the trial court's determination.

Specifically, appellant did not establish that he prevailed against the DMV or that the DMV's suspension error was arbitrary or capricious. As noted above, appellant's petition for writ of mandate was denied and judgment was entered in favor of the DMV. Moreover, there was no showing that the DMV's imposition of a one-year suspension following appellant's second administrative hearing was arbitrary or capricious. As explained in *Reis v. Biggs Unified School Dist.*(2005) 126 Cal.App.4th 809, 823: "'The award of attorney's fees under Government Code section 800 is allowed only if the actions of a public entity or official were wholly arbitrary or capricious. The phrase "arbitrary or capricious" encompasses conduct not supported by a fair or substantial reason [citation], a stubborn insistence on following unauthorized conduct [citation], or a bad faith legal dispute [citation].' [Citation.] '"Attorney's fees may not be awarded [under Gov. Code, § 800] simply because the administrative entity or official's action was erroneous, even if it was 'clearly erroneous.'"' [Citation.] 'The determination of whether an action is arbitrary or capricious is essentially one of fact, within the sound discretion of the trial court [citation].' [Citation.]"

Here, there was no showing that the initial one-year suspension was unsupported. At the administrative hearing, appellant did not raise the issue of the duration of the license suspension or bring to the hearing officer's attention that a portion of the one-year period had already elapsed. Nor did appellant show that the DMV maintained it position after being informed of the error. Though appellant argues the DMV insisted on maintaining the full one-year suspension even after the error was brought to its attention, there is no indication in the record that it was informed of the error by means other than the petition for writ of mandate. The DMV issued a corrected order of suspension approximately six weeks after the petition for writ of mandate was filed, having conducted its own internal review. Finally, there was no showing that the DMV acted in bad faith. (See *American President Lines, Ltd. v. Zolin* (1995) 38 Cal.App.4th 910, 934 [attorney fees under Gov. Code, § 800 unwarranted where the DMV took an incorrect, though not bad faith, legal position].) Appellant failed to establish he was entitled to an award of attorney fees pursuant to Government Code section 800.

**III. Appellant Was Not Entitled to Attorney Fees Pursuant to a Catalyst Theory.**

Finally, appellant endeavors to characterize himself as a "catalyst" entitled to an award of attorney fees by reason of the DMV's voluntary correction of his license suspension duration. We independently review the question of whether the catalyst theory applied. (See *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1132–1133 ["The determination of the statutory basis for an attorney fees award presents a legal issue for us to determine anew on appeal, regardless of the trial court ruling"].) We find no basis for application of a catalyst theory here.

In *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565–566 (*Graham*), the court broadly construed Code of Civil Procedure section 1021.5, ruling that a "successful party" who may be awarded attorney fees under the private attorney general statute should be determined by evaluating the impact of the action and not the manner of its resolution. The court determined "'that attorney fees may be proper whenever an action results in relief for the plaintiff, whether the relief is obtained through a "voluntary" change in the defendant's conduct, through a settlement, or otherwise.

[Citations.] [¶] Thus, an award of attorney fees may be appropriate where "plaintiffs' lawsuit was a *catalyst* motivating defendants to provide the primary relief sought . . . ." [Citation.] A plaintiff will be considered a "successful party" where an important right is vindicated "by activating defendants to modify their behavior."' [Citation.]" (*Graham, supra,* at pp. 566–567.) In a companion case, *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 610, the court extended application of the catalyst theory to Government Code section 12965, reasoning: "In light of similarities in language and purpose between Code of Civil Procedure section 1021.5 and Government Code section 12965, subdivision (b), we conclude that the catalyst theory, as articulated above, should apply to the award of fees under the latter statute." (See also *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 668–669 [applying catalyst theory to common fund and substantial benefit doctrines].)

Contrary to appellant's argument, the catalyst theory does not operate in a vacuum. Rather, it applies to permit a court discretion to award attorney fees in situations where a plaintiff has achieved a result that generally would have entitled him or her to attorney fees following judicial resolution. Because we have already determined that appellant was not entitled to attorney fees under Government Code section 800 for reasons other than the lack of a judicial resolution—and because he proffers no other independent basis for a fee award—application of the catalyst theory fails to assist him.

Moreover, even if we were to conclude that the catalyst theory was available here, appellant failed to show that he satisfied the elements necessary for application of the theory. To be eligible for an attorney fee award under the catalyst theory, a plaintiff must be a catalyst to the defendant's changed behavior, the lawsuit must have some merit and the plaintiff must have made a reasonable attempt to settle the matter prior to resorting to litigation. (*Graham, supra,* 34 Cal.4th at p. 560.) Here, appellant engaged in no settlement efforts before filing his petition for writ of mandate. After the hearing officer's decision, appellant's May 2007 request for departmental review omitted any reference to the duration of his license suspension. Further, appellant's August 2007 petition for writ of mandate in *Gergov II* contained no information suggesting that

appellant had attempted to resolve the license suspension issue before initiating litigation. Under these circumstances, we would find no basis for applying a catalyst theory even if it were available to appellant.

**DISPOSITION**

The trial court's cost order is affirmed. Each side to bear its own costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ